IN THE

United States Court of Appeals

FOR THE

NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, formerly Ward Industries Corporation,

Appellant,

vs.

NO. 20416

UNION TANK CAR COMPANY, a corporation,

Apellee.

PETITION FOR REHEARING

THOMAS C. McCONNELL
BOYLE, BILBY, THOMPSON & SHOENHAIR
Ninth Floor Valley National Bldg.
Tucson, Arizona

Attorneys for Appellee
Union Tank Car Company

IN THE

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DRAGOR SHIPPING CORPORATION,
formerly Ward Industries
Corporation,

Appellant,

NO. 20416

vs.

UNION TANK CAR COMPANY, a
corporation,

Appellee.

The appellee respectfully petitions the Court for a rehearing on the grounds hereinafter set forth.

I

The factual errors permeating the delivered opinion apparently stem from the Court's reliance on the false and misleading statements appearing in an uncorroborated affidavit of a Mr. Weiser, counsel for Dragor (R. 17).

> The delivered opinion of this Court asserts that: "The stipulations dismissing the two Arizona suits, called for by the settlement agreement, were executed in New York and thereafter filed in Arizona."

The truth is that while the settlement agreement and promissory note were executed by Dragor in New York on October 3, 1963, concurrently therewith the stipulation of dismissal were prepared by counsel for Dragor in Phoenix, Arizona, executed by Arizona counsel for the parties, and tendered to Judge Walsh on October 3, 1963, and an order was entered at Tucson, Arizona, on that same day, dismissing the cases. Certified copies of these orders are filed herewith.

It is thus seen that the intention of the parties in providing for delivery of stipulations of dismissal was to effectuate the dismissal with prejudice of both actions, simultaneously with and as an integral part of the settlement agreement. This completely removes the foundation for the language in the delivered opinion that:

> "The stipulations dismissing the Arizona suits *were executed in New York* but filed in Arizona. Such filing was long prior to Sep-

> tember 30, 1964, when, Union asserts, Dragor committed the breaches sued upon. The filing of these dismissals constitutes an isolated inconsequential act having no legal significance in this law suit." (Emphasis added)

The delivered opinion contains a further misstatement, again apparently based upon the Weiser affidavit:

> "No contention raised in Union's complaint or Dragor's answer brings into question any issue of fact or law pertaining to the former dealings between these parties in Arizona."

It is apparent that the set-off and counter claim filed as part of the answer does bring into question issues of fact pertaining to the former dealings between these parties in Arizona. Prior transactions between these parties involved the construction of missile bases in Tucson, Arizona, in the course of which Union and Dragor acquired claims against the government and Fluor, the prime contractor, arising out of the missile base contract. The settlement agreement expressly provides for the prosecution by Union of claim "arising out of the Titan II Davis-Monthan Air Force Base Contract No. DA-04-548-ENG-42, whether such sums sholl arise from Claim of Union, IMI-WARD . . . or otherwise . . ." (R. 100)

The counter claim charges that Union changed, altered, and dilatorily, inefficiently, and negligently asserted such claims for work done by the parties in Tucson, Arizona, so as to damage Dragor in a sum not less than a million dollars (R. 102-104). Clearly the counterclaim "brings into question" an issue of fact "pertaining to the former dealings between these parties in Arizona." The allegation that the claims were mishandled and misasserted will of necessity

require evidence as to proper performance of the work in Arizona, the cost of such work, the contractual relations between all of the parties to such work, and other pertinent factors in order to determine the nature of the claims and whether they have been competently and diligently asserted. The former dealings between the parties in Arizona are of prime importance in making these determinations.

The alleged breach of the covenant not to sue —asserted in the counterclaim was alleged to have occurred in Arizona during the trial of an action pending in Arizona, and the facts forming a basis for determining whether or not the breach occurred were to be found solely and exclusively in the records of an Arizona court. Moreover, the issue could be best determined by Judge Walsh who had heard all aspects of the Arizona controversy.

Moreover, Dragor asserts that its counterclaim arises out of the same transaction as the settlement contract sued on and therefore is a compulsory counterclaim (R. 105). If so, under this Court's decision that Union must sue in New York or Delaware, then the counterclaim must be litigated in a court far distant from the place where the work was done.

Judge Walsh was thoroughly familiar with the litigation involving the missile base contracts.[1] He had a right to ignore the uncorroborated Weiser affidavit as false. It was therefore the duty of the appellant to file a record sufficient to demonstrate whether or

[1] The District Court could take judicial notice of these other actions as they were referred to in the pleadings in this cause and represent related litigation. *Lowe v. McDonald,* 221 F.2d 228 (9th Cir. 1955); *Freshman v. Atkins,* 46 S. Ct. 41, 269 U.S. 121, 70 L. Ed. 193 (1925). And this Court will take judicial notice thereof, the District Court having done so. *Kalimin v. Liberty Mutual Fire Insurance Co.,* 300 F.2d 547 (2nd Cir., 1962).

not the District Court erred in so holding under penalty of dismissal of the appeal *T. V. T. Corp. vs. Basiliko,* 257 F. 2nd 185 (D. C. 1958). Dragor had full knowledge of the related litigation and should have brought the original records thereof to this Court or at least given an accurate account thereof. It's factual inaccuracies should not be permitted to succeed in leading this Court into error even though discovered on rehearing. *American Chemical Paint Co. v. Dow Chemical Co.*, 164 F 2nd 208 (6th Cir., 1947).

II

The District Court, in upholding jurisdiction, found as a fact that the contractural obligations asserted in the complaint and counterclaim were contracts "involving business done . . . in Arizona." Judge Walsh was familiar with the multi-million dollar missile base contracts, their performance by the various parties, the litigation and settlement, and the entire background of the controversy. His finding that these contracts were contracts "involving business done" by Dragor in Arizona should not be disregarded by this Court as though it were free to determine factual issues *de novo.*

III

The Court erred in holding, in effect, that the mere fact that the settlement agreement and note were executed in New York makes this transaction between the parties exclusively a New York transaction. The fact that the instruments were signed in New York by Dragor is purely fortuitous, resulting from the fact that Isbrandtsen, the surety, (R. 8) was in New York, and Union required his guarantee as part of the transaction. Nothing in the record shows that the parties intended the transaction to be a New York transaction.[2] Union had no connection

with New York, and Union was in full control of the settlement. Dragor was in stringent financial condition (R. 83), was being forced to trial on Union's action, and did not dare bring on its own suit against Union because that action was totally without merit.

[2] The Agreement and note contain no reference whatsoever to New York, and the note by its terms is to be construed according to Illinois law (R.5).

IV

This court also erroneously assumes that because Dragor gave Union a promissory note, executed in New York, that thereby Dragor ceased to be a debtor and that Union was no longer a creditor. The settlement papers provide that the note was to be construed in accord with Illinois law (R. 11). That Union was a creditor under Illinois law is shown by the case of *Superior Plating Co. v. Art Metals Crafts Co.,* 218 Ill. App. 148, 150.

This Court has further overlooked the fact that Dragor had appointed C. T. Corporation as its agent for the acceptance of service of process and that such appointment had never been revoked either by any act of Dragor's or by any act of the State of Arizona, because the permission granted Dragor to withdraw from Arizona excepted from its terms Dragor's creditors.[3]

[3] "Defendant further argues that since process was not served until some nine months after defendant's activities in the state ceased, the defendant was not doing business in Iowa at the time of service of notice and that service could not be made upon it in June of 1953. This contention is not sound. A foreign corporation which has ceased to do business in a state is still subject to service of process in suits on causes of action which arose out of business carried on by the defendant in the state. 20 C. J. S., Corporatioons, S 1920, p. 170; Zendle v. Garfield, 29 F 2d 415; Kelly v. Johnson Nut Co., 38 F. 2d 177; Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222, 110 A. L. R. 1415."

CONCLUSION

We respectfully suggest that this Court has departed from its proper function as a reviewing court and has attempted to deal with factual situations *de novo* without having before it the entire record. We further suggest that, because of the importance of the legal precedent here involved, this matter should be reheard by this Court, and the Court should defer a final decision in this case until it has had an opportunity to examine the entire record which will be presented to this Court in the appeal from the judgment entered against Dragor on the counterclaim.

We submit, therefore, that this Court, for reasons set forth above, should either grant a rehearing in the instant case, or take the petition for rehearing under advisement and reserve a decision thereon until after a hearing has been had on the appeal from the judgment entered against Dragor on the counterclaim.

Respectfully submitted,
THOMAS C. McCONNELL
BOYLE, BILBY, THOMPSON &
SHOENHAIR

By H. C. Warnock

Attorneys for Appellee
Ninth Floor Valley National Bldg.
Tucson, Arizona

CERTIFIED

I hereby certify that in my judgment the foregoing motion for rehearing is well founded, and that it is not interposed for delay.

HAROLD C. WARNOCK
Counsel for Appellee

FOLDOUT BLANK

OCT 3 1963

1:40 p.m.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNION TANK CAR COMPANY,

Plaintiff,

v.

WARD INDUSTRIES CORPORATION,

Defendant.

No. Civ. 1482-Tuc.

STIPULATION AND ORDER FOR DISMISSAL

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, that the above-entitled action, including the Complaint and Counterclaim, be dismissed and discontinued with prejudice and without costs to either party against the other, and that an Order to such effect may be entered without notice to either party.

Dated this 3rd day of October, 1963.

THOMAS C. McCONNELL
BOYLE, BILBY, THOMPSON & SHOENHAIR

By _____
Attorneys for Plaintiff

LOTTERMAN & WEISER
EVANS, KITCHEL & JENCKES

By _____
Attorneys for Defendant

O R D E R

Pursuant to the foregoing Stipulation, IT IS HEREBY ORDERED, that the above-entitled action, including the Complaint and Counterclaim, be and the same is hereby dismissed with prejudice and without costs to either party against the other.

Done in Open Court this 3rd day of October, 1963.

_____
United States District Judge

OCT 3 1963

EVANS, KITCHEL & JENCKES
363 NORTH FIRST AVENUE
PHOENIX, ARIZONA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

WARD INDUSTRIES CORPORATION,

Plaintiff,

v.

UNION TANK CAR COMPANY and IDAHO MARYLAND INDUSTRIES, INC.,

Defendants.

No. Civ. 1478-Tuc.

STIPULATION AND ORDER FOR DISMISSAL

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, that the above-entitled action be dismissed and discontinued with prejudice and without costs to either party against the other, and that an Order to such effect may be entered without notice to either party.

Dated this 3rd day of October, 1963.

LOTTERMAN & WEISER
EVANS, KITCHEL & JENCKES
By _____
Attorneys for Plaintiff

THOMAS C. McCONNELL
BOYLE, BILBY, THOMPSON & SHOENHAIR
By _____
Attorneys for Defendant UNION TANK CAR COMPANY

ORDER

Pursuant to the foregoing Stipulation, IT IS HEREBY ORDERED, that the above-entitled action be and the same is hereby dismissed with prejudice and without costs to either party against the other.

Done in Open Court this 3rd day of October, 1963.

_____
United States District Judge

EVANS, KITCHEL & JENCKES
363 NORTH FIRST AVENUE
PHOENIX, ARIZONA